

a third-gender category inherently regulates *between* those who identify as women. Intermediate scrutiny does not require that the government adopt the least-restrictive means to achieve its end.¹³² However, a “substantial relation” does necessitate a strong connection between the means employed and the purported end.¹³³ Courts prefer an empirical showing that the complained-of problem would likely be remedied by the adopted regulation.¹³⁴ This part will survey relevant studies that could be used to attempt to sustain, or attack, a third-gender category. This analysis will show that science cannot sufficiently link any purported benefits of a third-gender category to sustaining the safety or fairness of women’s sports in a way that satisfies intermediate scrutiny.

i. An Empirical Overview of Remaining “Inherent Biological Advantage”

The rationale for protecting the safety or fairness of women’s sports emerges primarily from the assumption that transgender women have an innate physical advantage over cisgender

¹³² See *Virginia*, 518 U.S. at 573 (1996) (Scalia, J. dissenting).

¹³³ “A remedial decree, this Court has said, must closely fit the constitutional violation.” *Id.* at 547.

¹³⁴ See *Craig*, 429 U.S. at 200–01 (finding inaccurate or weak statistical evidence to be insufficient to sustain substantial relation to traffic safety rationale for different drinking ages between men and women); *Grimm*, 972 F.3d at 614 (no substantial relation existed to government actor’s purported goal where the government presented no evidence justifying state’s privacy concerns for regulating transgender individual’s choice of bathroom); *Hecox v. Little*, 479 F. Supp. 3d 930, 975 (D. Idaho 2020) (finding no substantial relationship to purported goals of ensuring equality and opportunities for female athletes in Idaho where government provided no empirical evidence to support its interest in instituting a transwomen athlete ban in scholastic sports).

women by the very fact that they were assigned male at birth.¹³⁵ Yet, as explained below, scientific evidence cannot support using these rationales to relegate transwomen athletes to a third-gender category. There may be a better solution to including transwomen athletes in elite sports and allowing them to compete in line with their gender identity besides competing in the women's category; the key point here is that a solution that relegates them to a third-gender category *cannot* withstand intermediate scrutiny.

As we will see, various scholars have reached differing conclusions as to the performance benefits retained by transwomen athletes post-hormone treatment. For example, some conclude that “currently, there is no direct or consistent research suggesting transgender female individuals (or male individuals) have an athletic advantage at any stage of their transition.”¹³⁶ Yet others find sustained strength retention after a year of hormone therapy, even if cardiovascular benefits are nullified.¹³⁷ This lack of consensus in empirical research indicates how problematic it would be for a state to rest its third-gender category on science.

¹³⁵ Because this inherent assumption lies at the heart of both a safety or fairness rationale for government intervention, my arguments about the substantial relationship between the government's interest in regulating transgender participation in elite sports and a third gender category will simultaneously address both rationales discussed in Parts III.c.i and III.c.ii.

¹³⁶ Jones et al., *supra* note 104, at 710. *See also* E·Alliance, *supra* note 100, at 4 (“Available evidence indicates trans women who have undergone testosterone suppression have no clear biological advantages over cis women in elite sport.”).

¹³⁷ *See* Harper et al., *supra* note 92, at 870, 872; Roberts et al., *supra* note 90, at 579.

On top of the lack of consensus on retained benefits, methodological approaches used by researchers raise further questions about the reliability of their studies. In its comprehensive literature review of transgender athlete participation in elite sport, E·Alliance found that the limited studies available which assess transgender athletes's capabilities are flawed. First, studies available compare transgender women to cisgender men, not to cisgender women, to assess retained advantage.¹³⁸ This assumes that transgender women are most comparable to cisgender men, when data shows that neither pre-testosterone nor post-testosterone-suppression transgender women can be compared to cisgender men because of differences in baseline height and weight.¹³⁹ Additionally, studies show that testosterone levels, as one biological marker among many, are not sufficient to predict sporting success.¹⁴⁰ Yet, studies largely assume testosterone links to performance without providing a basis for use of that metric over other factors like lean body mass or strength.¹⁴¹ Lastly, E·Alliance found that sedentary transwomen appear to be firmly within the normal distribution of lean body mass, cross section area, and strength in cisgender women, suggesting “no residual effect on these traits exist once variations in height, weight, participation

¹³⁸ E·Alliance, *supra* note 100, at 20.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 16 (citing Stephane Bermon & Pierre-Yves Garnier, *Serum Androgen Levels and Their Relation to Performance in Track and Field: Mass Spectrometry Results from 2127 Observations in Male and Female Athletes*, 51 BR. J. SPORTS MED. 1309 (2017)).

¹⁴¹ *Id.* at 22. See also *supra* note 23 and accompanying text.

rates and social factors are accounted for.”¹⁴² Thus, the scientific evidence does not come close to conclusively showing that transwomen athletes have an innate competitive advantage as would be required to overcome an equal protection challenge.¹⁴³

ii. Why Advantage Still Isn’t Sufficient

E·Alliance’s study is relevant because it reveals that current science cannot conclusively show transwomen athletes retain an *overwhelming* competitive advantage post-testosterone suppression. Studies cited by E·Alliance do acknowledge that strength benefits may linger, even after three years of testosterone suppression.¹⁴⁴ Yet, they also confirm that twelve months of testosterone suppression reduces transwomen athletes’s endurance advantages over cisgender

¹⁴² *Id.* at 24. E·Alliance does not cite any like comparisons between elite transwomen athletes and elite cisgender athletes. Thus, we must infer that these sedentary-focused studies will track onto elite athletes. Additionally, we should not be alarmed that these studies account for height or weight because, in many elite sports, cisgender women compete against other cisgender women who may outweigh them by fifty pounds or be up to a foot taller than them. *See supra* Part III.c.i.

¹⁴³ If anything, the science shows that transwomen who have received twelve months of hormone therapy lose performance advantages. Roberts et al., *supra* note 90, at 580–81. However, any conclusion on the best policy proposal regarding testosterone suppression to allow transwomen to compete is beyond the scope of this note. This scientific evidence is relevant to the legal framework of my argument insofar as it shows that a state could not justify separating transwomen from the female category on fairness or safety grounds because the state’s fairness and safety concerns are unsubstantiated.

¹⁴⁴ *See* Harper et al., *supra* note 92, at 872; Roberts et al., *supra* note 90, at 579.

female athletes.¹⁴⁵ Thus, even if strength advantages linger, we must focus on whether these slight advantages make the fairness or safety interests sufficient enough to be substantially related to a policy relegating transwomen athletes to a third-gender category.

Taryn Knox, Lynley Anderson, and Alison Heather, three sports and medical ethics experts, rely on the concept of “tolerable unfairness” to argue that retained advantages should not bar transwomen athletes from competing in their preferred gender-identity category.¹⁴⁶ Many aspects of sport already embrace certain “tolerable unfairnesses” such as socioeconomic factors or biological advantages.¹⁴⁷ Thus, allowing transgender women to compete in order to fully embrace their gender identity, regardless of any sustained biological advantages, can just be added to the list of pre-existing “tolerable unfairnesses.”¹⁴⁸ This argument further compounds on the lack of evidence a state could present that any safety concerns or unfairness to cisgender women athletes would be resolved by relegating transgender women to a third category.

¹⁴⁵ See Harper et al., *supra* note 92, at 870; Roberts et al., *supra* note 90, at 579.

¹⁴⁶ Taryn Knox, Lynley C. Anderson & Alison Heather, *Transwomen in Elite Sport: Scientific and Ethical Considerations*, 45 J. MED. ETHICS 395, 399 (2019).

¹⁴⁷ *Id.*

¹⁴⁸ Andria Bianchi counters this argument by saying that transgender women’s advantage in sport is “intolerably” unfair because no cisgender woman can achieve the same advantage because of doping rules. See generally Andria Bianchi, *Transwomen in Sport*, 44 J. PHIL. SPORT 229 (2017). However, in sport some women can never achieve the innate biological advantages of their cisgender female competitors, like height or wingspan.

Additionally, recent actions taken in conservative states to prevent minors from receiving gender-confirming care would foreclose any avenue (in those states) for a transgender woman to compete in the female category. World Aquatics mandates pre-puberty transition¹⁴⁹ to compete in the female category because scientific consensus has built around the understanding that differences in biological ability between male and female individuals generate after puberty.¹⁵⁰ Yet, transwomen athletes in Texas would be barred from women's competition if the state adopted a third-gender category because transwomen athletes could not transition pre-puberty due to Governor Abbott's latest directive to the Texas Department of Family and Protective Services, which classifies medical treatments for transgender adolescents as "child abuse" under state law.¹⁵¹ Thus, the criteria articulated by World Aquatics exacerbate equal protection problems. Without the ability to transition, an elite transwoman athlete is effectively foreclosed from the opportunity to compete in line with her gender identity. It is hard to imagine how a "fairness" rationale could justify a policy with such unfair results under intermediate scrutiny.

Two logical conclusions must be adopted if we are to agree that a third-gender category does not survive the second prong of intermediate scrutiny. First, empirical evidence cannot justify

¹⁴⁹ World Aquatics Policy, *supra* note 13, at 7.

¹⁵⁰ See generally David J. Handelsman, *Sex Differences in Athletic Performance Emerge Coinciding with the Onset of Male Puberty*, 87 CLINICAL ENDOCRINOLOGY 68 (2017).

¹⁵¹ Letter from Governor Greg Abbott to Texas Department of Family and Protective Services (Feb. 22, 2022). See also Alene Bouranova, *Explaining the Latest Texas Anti-Transgender Directive*, BU TODAY (Mar. 3, 2022), <https://www.bu.edu/articles/2022/latest-texas-anti-transgender-directive-explained/>.

regulating transgender participation in sport because there is no conclusive evidence showing that transwomen athletes retain an insurmountable competitive advantage post-testosterone suppression. Second, even if the remaining advantage was a heightened concern, it cannot be substantially related to a policy in which a state determines that certain women do not deserve to compete in line with their gender identity. While state interests may suffice to allow regulation of gender categorization in sport, this part has shown that those interests do not justify relegating transgender women to a third-gender category. Thus, any state-sponsored third-gender category would fail to survive constitutional attack.

But what about non-state actors? As previously discussed, elite sport in the United States is largely privatized.¹⁵² Part IV will explore the legal challenges private sporting bodies, like NGBs, will face if they attempt to adopt a third-gender category.

IV. PRIVATE SPORTING BODIES AND THE LAWS THEY FACE

a. Public Accommodation Laws

The federal government and each of the fifty states have their own public accommodation statutes. Broadly, these statutes prohibit discrimination against certain classes of individuals in places of public accommodation.¹⁵³ Currently, twenty-four states prohibit discrimination based on

¹⁵² See *supra* notes 6–10 and accompanying text.

¹⁵³ Every state with a public accommodation law prohibits discrimination in public accommodations based on race, gender, ancestry, and religion. *State Public Accommodation Laws*, NAT'L CONF. STATE LEGISLATURES (June 25, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx>. The federal government's public

gender identity. Albeit using different language, each of these states defines “public accommodation” to include sporting arenas (some more explicitly than others).¹⁵⁴ Because a third-

accommodations statute does not protect individuals from discrimination based on gender identity. *See* 42 U.S.C. § 2000a(a). Thus, this section focuses purely on state law.

¹⁵⁴ California, Connecticut, Delaware, Iowa, New Mexico, Vermont, and Virginia broadly define public accommodations as any place serving the general public. *See* CAL. CIV. CODE § 51(b) (West 2016); CONN. GEN. STAT. § 46a-63 (2023); DEL. CODE ANN. tit. 6 § 4502 (2022); IOWA CODE § 216.2(13) (2019); N.M. STAT. ANN. § 28-1-2(H) (2021); VT. STAT. ANN. tit. 9 § 4501(1) (2019); VA. CODE ANN. § 2.2-3904 (2021). Colorado, Washington D.C., Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Washington directly include sporting arenas (some specifically enumerating places like swimming pools and gymnasiums) in their definitions of “public accommodations.” *See* COLO. REV. STAT. § 24-34-601 (2021); D.C. CODE § 2-1401.02(24) (2022); HAW. REV. STAT. § 489-2 (2019); 775 ILL COMP. STAT. 5/1-101 (2006); ME. STAT. tit. 5 § 4553(8) (2022); MD. CODE ANN. STATE GOV’T § 20-301 (2019); MASS. GEN. LAWS ch. 272 § 92A (2016); MICH. COMP. LAWS § 37.2301 (2023); NEV. REV. STAT. § 651.050 (021); N.H. REV. STAT. ANN. § 354-A:2 (2018); N.J. STAT. ANN. § 10:5-5 (2020); N.Y. EXEC. LAW § 292(2) (2022); OR. REV. STAT. § 659A.400(1) (2022); 43 PA. CONS. STAT. § 954 (2019); R.I. GEN. LAWS § 11-24-3 (2022); WASH. REV. CODE § 49.60.040(2) (2020). Minnesota and Wisconsin define public accommodations to include any place of recreation. *See* MINN. STAT. § 363A.03 (2023); WIS. STAT. § 106.52 (2016).

gender category inherently discriminates on the basis of sex,¹⁵⁵ if private sporting bodies adopt third-gender categories and proceed to host competitions at public accommodations, transwomen athletes may sue under state public accommodation laws where applicable. In fact, transwomen athletes have already successfully used these statutes to remedy discrimination against them.

i. Examples of Public Accommodation Laws in Action

In 2021, Jaycee Cooper filed a lawsuit against USA Powerlifting and USA Powerlifting Minnesota alleging sex and sexual orientation discrimination in violation of the Minnesota Human Rights Act.¹⁵⁶ Ms. Cooper, a competitive women’s powerlifter and transgender woman, alleges she was denied the opportunity to compete based on her transgender status.¹⁵⁷ Ms. Cooper alleges that “Defendants USAPL and USAPL MN discriminated against Ms. Cooper in public accommodations by denying her application to compete because she is a transwoman, by subsequently enacting a policy categorically banning transwomen from USAPL competitions, and by organizing, promoting, and executing sanctioned powerlifting meets in Minnesota at which transwomen were categorically barred from competing.”¹⁵⁸ Because powerlifting competitions are held in a place of recreation, Minnesota’s public accommodations statute applies to prevent discrimination against transgender athletes in competition.¹⁵⁹ Ms. Cooper’s case shows that

¹⁵⁵ See *infra* Part III.B.i.

¹⁵⁶ MINN. STAT. § 363A.11 (2023).

¹⁵⁷ Complaint at 1, 21, Cooper v. USA Powerlifting, No. 0:21-CV-00401 (D. Minn. Feb. 11, 2021).

¹⁵⁸ *Id.* at 21.

¹⁵⁹ MINN. STAT. § 363A.03 (2023). Individuals looking to use public accommodations statutes for recourse must look to the precedent of their respective jurisdiction to understand how public

transgender athletes may use state public accommodations statutes to protect themselves from discriminatory policies like third-gender categories.

Other athletes have also used public accommodations statutes to fight categorical bans on transwoman-athlete participation in sport. In 1977, a lower state court in New York ruled that the U.S. Tennis Association had violated state non-discrimination law when it implemented a chromosome test for the purpose of excluding Renee Richards from the women's draw of the U.S. Open.¹⁶⁰ Since Richards's case, there had yet to be another successful plaintiff remedying discrimination against transgender athletes until Christina Ginther sued the Independent Women's Football League.¹⁶¹ Christina Ginther, a transgender woman, joined an all-female football league

accommodations laws may apply to them. A complete survey of each state's public accommodation law applies is outside the scope of this note. I focus on Ms. Cooper's suit and Minnesota's public accommodation law only to show that these statutes will serve as a tool for transwomen athletes to challenge any adopted third-gender category. For a discussion of the scope and application of state public accommodation laws, see generally Lisa G. Lerman & Annette K. Sanderson, Comment, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 238–86 (1978).

¹⁶⁰ Buzuvis, *Law, Policy, and Participation*, *supra* note 96, at 446.

¹⁶¹ See *Ginther v. Enzuri Grp., Inc.*, No. 19HA-CV-17-857, 2020 WL 588024 (Minn. Ct. App. Oct. 5, 2020).

in 2016.¹⁶² When her team found out she is transgender, the football league discriminated against her in violation of the Minnesota Human Rights Act.¹⁶³ Ginther sued, and a jury awarded her \$20,000.¹⁶⁴ The more frequently private sporting organizations discriminate against transwomen athletes, the more useful these statutes will become in fighting discrimination. The successes of athletes like Richards and Ginther create a path forward for transwomen athletes should NGBs or other private sports organizations adopt a third-gender category.

Proponents of third-gender categories may argue that public accommodations laws should not apply to sports because competitions are not always open to the public. It is general knowledge that most elite sporting competitions require qualification to be able to compete. Yet, the above examples show that transwomen athletes have challenged discriminatory policies based on their inability to participate even at the highest level of sport, where qualification would be required.¹⁶⁵ Even the strongest critics of transwomen participation in elite female sport cannot deny the

¹⁶² See Mary Lynn Smith, *Jury's Award to Transwoman after Rejection by Football Team is a Minnesota First*, STAR TRIBUNE (Dec. 21, 2018, 10:17 P.M.), <https://www.startribune.com/jury-s-award-to-transgender-woman-rejected-by-football-team-is-a-minnesota-first/503365442>.

¹⁶³ Ginther specifically sued under the business discrimination section of the Minnesota Human Rights Act. See MINN. STAT. § 363A.17 (2023). She argued that the team discriminated against her based on her “sexual orientation.” *Ginther*, 2020 WL 588024, at *1.

¹⁶⁴ *Id.*

¹⁶⁵ Cooper was barred from competing at the Minnesota State Bench Press Championships and Minnesota Women’s Championship. Complaint at 14, *Cooper v. USA Powerlifting*, No. 0:21-CV-00401 (D. Minn. Feb. 11, 2021).

applicability of these statutes to prevent discrimination against transgender athletes in elite sport. Nancy Hogshead-Makar, an Olympic gold medalist, is a strong advocate for excluding transwomen athletes from women's sport. In a public statement to a Florida news outlet, Hogshead-Makar said, "I agree that trans women are women for all purposes, meaning the classroom and the employment and family law and *public accommodations*, et cetera. But when it comes to sport, you cannot deny biology and facts."¹⁶⁶ Yet, because twenty-four states prohibit discrimination against transgender individuals in public accommodations, Hogshead-Makar's statement is inherently contradictory.

Transgender women must be given an equal opportunity to compete when competitions are held at public accommodations where applicable law exists.¹⁶⁷ A third-gender category is not an equal opportunity. Transgender women are severely underrepresented in sport and a third category implicitly tells transgender women that they are not "woman enough" to be seen as female in sports. This is inherently discriminatory.

¹⁶⁶ Julie Kleigman, *Understanding the Different Rules and Policies for Transgender Athletes*, SPORTS ILLUSTRATED (Jul. 6, 2022), <https://www.si.com/more-sports/2022/07/06/transgender-athletes-bans-policies-ioc-ncaa> (emphasis added).

¹⁶⁷ For a general example, the federal public accommodations statute states, "all persons shall be entitled to the full and equal enjoyment" of public accommodations. 42 U.S.C. § 2000a(a). While this statute does not prohibit discrimination in public accommodations based on gender identity or sex like the state statutes listed above, it does show that unequal access to public accommodations is discrimination under a public accommodation statute.

Even if a NGB or private sporting body decided to create a third-gender category, it would not be able to use public accommodations to run its competitions in twenty-four states.¹⁶⁸ While this note will not address the practicalities of implementing a third-gender category at length, it is worth describing the difficulties national organizations would face in implementing such a category under conflicting state laws. Take USA Swimming as a hypothetical. USA Swimming hosts a variety of meets targeted at elite-level professional athletes. For example, its “Pro Swim Series” consists of four swim meets where top competitors earn prize money for event wins and setting records.¹⁶⁹ These competitions are rarely held in the same state. Thus, if USA Swimming hosted a Pro Swim Series stop in California, California’s public accommodation law would prohibit USA Swimming from implementing a third-gender category at the competition if it were held at a public pool.¹⁷⁰ By contrast, if USA Swimming hosted a stop in Texas,¹⁷¹ USA Swimming could in theory relegate any elite transwomen competitors who do not comply with USA

¹⁶⁸ See *supra* note 154.

¹⁶⁹ Matthew de George, *USA Swimming Announces 2023 Schedule, With Pro Swim Series Stop at New ISHOF Pool* (Jul. 13, 2022), <https://www.swimmingworldmagazine.com/news/usa-swimming-announces-2023-schedule-with-pro-swim-series-stop-at-new-ishof-pool/>.

¹⁷⁰ See CAL. CIV. CODE § 51(b) (West 2016).

¹⁷¹ Texas does not have a public accommodation statute. See *State Public Accommodation Laws*, NAT’L CONF. STATE LEGISLATURES (Jun. 25, 2021), <https://www.ncsl.org/civil-and-criminal-justice/state-public-accommodation-laws>.

Swimming's transition guidelines to compete to a third-gender category.¹⁷² Thus, participatory guidelines would be different throughout the series, disrupting the continuity of the Pro Swim Series competition.¹⁷³ Even putting the practical impossibilities of this hypothetical scenario aside, implementing a third-gender category, even in a state with no protective public accommodation law, would jeopardize USA Swimming's ability to serve as the NGB for swimming under the Ted Stevens Act. It is to these federal law implications we now turn.

b. The Risk of Failing to Qualify as an NGB

As previously discussed, elite sport in the United States is governed almost entirely by NGBs under the Ted Stevens Amateur Sports Act.¹⁷⁴ In order for an organization to qualify for recognition as a NGB, and thus be able to participate in the Olympic movement, the NGB must "provide[] an equal opportunity to amateur athletes, coaches, trainers, managers, administrators, and officials to participate in amateur athletic competition without discrimination on the basis of .

¹⁷² This hypothetical assumes the current guidelines USA Swimming has implemented regarding transgender athlete participation, which require a transgender female to maintain a testosterone concentration of less than 5 nmol/L for a period of at least thirty-six months. USA SWIMMING, *Athlete Inclusion, Competitive Equity and Eligibility Policy* 41, 43 (Feb. 1, 2022), https://www.usaswimming.org/docs/default-source/governance/governance-lsc-website/rules_policies/usa-swimming-policy-19.pdf.

¹⁷³ Braden Keith, *USA Swimming Adds New March Pro Swim; Reinstates Prize Money*, SWIM SWAM NEWS (Feb. 8, 2022), <https://swimswam.com/usa-swimming-adds-new-march-pro-swim-reinstates-prize-money/>.

¹⁷⁴ See *supra* notes 5–6 and accompanying text.

... sex”¹⁷⁵ If a private sports organization like USA Swimming tried to create a third-gender category at its elite competitions, the organization would inherently be discriminating on the basis of sex.¹⁷⁶ It would therefore lose its status as a NGB.

NGBs have the power to govern amateur sport in the United States,¹⁷⁷ coordinate national and international championship competitions,¹⁷⁸ and recommend individuals to compete for the United States at the Olympic, Paralympic, and Pan-American Games.¹⁷⁹ They *must* “allow an amateur athlete to compete in any international amateur athletic competition conducted by any amateur sports organization or person,”¹⁸⁰ “provide equitable support and encouragement for participation by women” where sports are gender segregated,¹⁸¹ and encourage meaningful participation for disabled athletes.¹⁸² While NGBs may “determine eligibility standards for participation in competition,”¹⁸³ the explicit requirements of a NGB’s obligations serve to protect and promote equal opportunities for all athletes, regardless of ability. If the NGB who has historically undertaken these duties fails to comply with the equal opportunity requirements of

¹⁷⁵ 36 U.S.C. § 220522(a)(8).

¹⁷⁶ *See supra* Part III.b.

¹⁷⁷ 36 U.S.C. § 220523(a)(3).

¹⁷⁸ 36 U.S.C. § 220523(a)(5).

¹⁷⁹ 36 U.S.C. § 220523(a)(6).

¹⁸⁰ 36 U.S.C. § 220524(a)(5).

¹⁸¹ 36 U.S.C. § 220524(a)(6).

¹⁸² 36 U.S.C. § 220524(a)(7).

¹⁸³ 36 U.S.C. § 220523(a)(5).

Section 220523(a)(8), there would be a power void in that sport until a new body existed to fill the infrastructure as required by the Act. Until then, United States sport would suffer at the national and international level. This is because the Ted Stevens Amateur Sports Act does not allow the United States to send athletes to the Olympic Games in a sport without a NGB to select those athletes.¹⁸⁴ Thus, both policymakers and private sporting bodies must ask, “is it really worth relegating transwomen athletes to a separate category to preserve some faint ‘fairness’ or ‘safety’ interest when it risks destroying that sport’s infrastructure throughout the country and at the international stage?” The analysis provided throughout this note should caution that the answer to that question is a resounding “no.”

V. CONCLUSION

When Erica Sullivan arrived at the 2022 NCAA Women’s Swimming and Diving Division I Championships, she and her teammates at the University of Texas, Austin were eager to put their hard work throughout the season on display. While Sullivan and her teammates surely delivered on that expectation,¹⁸⁵ Sullivan left the meet feeling as though the record-breaking swimming had

¹⁸⁴ 36 U.S.C. § 220523(a)(6).

¹⁸⁵ The University of Texas Women’s Swimming and Diving team finished second overall at the national meet. This was the team’s best finish since 1994. Women’s Swimming & Diving, *Women’s Swimming and Diving Finishes Second at NCAA Championships*, UNIV. OF TEX. (Mar. 19, 2022), <https://texassports.com/news/2022/3/19/womens-swimming-and-diving-womens-swimming-and-diving-finishes-second-at-ncaa-championships.aspx#:~:text=ATLANTA%20%E2%80%93%20Texas%20Women's%20Swimming%20and,Longhorns'%20best%20finish%20since%201994.>

been overshadowed by certain swimmers and protestors turning the meet into a political statement.¹⁸⁶

Erica Sullivan is no stranger to stiff competition. As an Olympic silver medalist and member of the USA Swimming National Team since she was seventeen,¹⁸⁷ Sullivan's athletic prowess is incredibly impressive. Yet, Sullivan did not come home undefeated in individual competition at the 2022 NCAA Championships. Sullivan was the runner-up in the women's 1650-yard freestyle and placed third in the 500-yard freestyle behind fellow Olympic silver medalist Emma Weyant in second and Lia Thomas in first.¹⁸⁸ Sullivan remembers nothing extraordinary about the race.¹⁸⁹ She was in first-place contention until about the half-way mark, and finished less than three seconds off the winning time.¹⁹⁰ While happy with her swims and her team's success, Sullivan's experience at the 2022 NCAA Championships was tainted by the political backlash

¹⁸⁶ Zoom interview with Erica Sullivan (Feb. 7, 2023) (transcript and recording on file with author).

¹⁸⁷ Sullivan finished second at the Tokyo Olympic Games in the women's 1500-meter freestyle. *Id.*

¹⁸⁸ See James Sutherland, *2022 Women's NCAA Championships: Results and Records Summary*, SWIM SWAM News (Mar. 22, 2022), <https://swimswam.com/2022-womens-ncaa-championships-results-records-summary/>.

¹⁸⁹ See Zoom Interview with Erica Sullivan, *supra* note 186.

¹⁹⁰ See Sutherland, *supra* note 188.

surrounding a photograph taken out of context following the 500-yard freestyle race.¹⁹¹ It is this, and not her achievements in the pool, that colors her memories from the championships.¹⁹²

Sullivan, an avid supporter of LGBTQ+ access in sport,¹⁹³ is not surprised by the third-gender category proposal put forth by World Aquatics in 2022.¹⁹⁴ In fact, Sullivan says she wouldn't even be surprised if USA Swimming adopted such a category to keep donors happy.¹⁹⁵ However, Sullivan would find any implementation of a third-gender category incredibly

¹⁹¹ Conservative news outlets circulated a photo of Thomas standing alone on the podium after the 500-yard freestyle, while Sullivan and her Tokyo Olympics teammates (Emma Weyant and Brooke Forde) took a group photo standing on the third-place podium. These outlets reported that the three women were protesting Thomas' inclusion in the competition. However, both Sullivan and Forde have since denied allegations that this photo was taken in protest, revealing that the photo was posted out of context. See REUTERS FACT CHECK, *Fact Check-Women's swimming Contest Photo Shared 'Out of Context,' Says Pictured Athlete* (Mar. 22, 2022), <https://www.reuters.com/article/factcheck-sport-swimming/fact-check-womens-swimming-contest-photo-shared-out-of-context-says-pictured-athlete-idUSL2N2VP1XH>.

¹⁹² Sullivan revealed how infuriating it was to see right-wing media and even people she knows personally share that photo, especially those who knew she would never protest Thomas's inclusion in the Championships. Dealing with the aftermath took away from her accomplishments in the pool. Zoom Interview with Erica Sullivan, *supra* note 186.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

problematic for transgender representation and disrespectful of modern social developments.¹⁹⁶ Sullivan's greatest fears over the implementation of a third-gender category at any level stem from the harassment that transgender individuals face in society at large.¹⁹⁷ She worries that the implementation of a third-gender category will give transphobic individuals a soap box to tout discriminatory rhetoric.¹⁹⁸ Sullivan denounces any "fairness" justification for subjugating transwomen to separate treatment in elite sports because "the fairness cause to save women's sports is just another tactic to fit the transphobic narrative."¹⁹⁹ The fact that a state or private actor would choose to open up transgender athletes to a new arena for harassment is "terrifying."²⁰⁰

What elite athletes think about a third-gender category should be part of the conversation surrounding legislative proposals to regulate transgender participation in sport. In fact, many athletes, including Sullivan, would argue that the moral and public policy implications of such a proposal should be reason enough to avoid adopting a third-gender category.²⁰¹ While perspective like Sullivan's is crucial to any political debates, the bottom line as shown throughout this note is a legal one. Regardless of any perspective on whether regulating transgender participation in elite sport is normatively good or not, the specific third-gender-category proposal as outlined by World Aquatics could not stand against United States law.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

This is true whether adopted by a state or private actor. As shown in Part III, a state-sponsored third-gender category would fall to a Fourteenth Amendment challenge, even if supported by a “safety” or “fairness” rationale. And in Part IV, we clearly see that a private actor adopting a third-gender category would face legitimacy problems under state and national law. Thus, even if a sports-governing body believed implementing a third-gender category in elite sports was a good policy objective, the legal challenges to such a plan should prevent its adoption.

The debate about how transgender women should compete in elite sports is live and contentious in American society. Some strongly advocate for inclusion with no limits. Others caution against any opportunity for transgender women, especially, to compete in line with their gender identity. Regardless of where one’s beliefs fall on this topic, a third-gender category cannot serve as a practical solution to the “fairness in women’s sports” debate that has arisen in elite athletics, at least not under the laws of the United States.